JD(NY)–38–08
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LOCAL 79, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and **Case No. 29-CC-1564**

JMH DEVELOPMENT, LLC

LOCAL 79, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and **Case No. 29-CC-1566**

MARATHON ASSET MANAGEMENT, LLC

Nancy K. Reibstein, Esq., Counsel for the General Counsel
Richard I. Milman, Esq., Counsel for JMH Development, LLC
Charles H. Kaplan, Esq., Counsel for Marathon Asset Management LLC
Joseph J. Vitale, Esq., Counsel for the Union

DECISION

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York on June 24, 25 and July 1, 2008. The charge in 29-CC-1564 and the charge in 29-CC-1566 were respectively filed on March 25 and April 4, 2008. The Consolidated Complaint which was issued on May 29, 2008 alleges as follows:

1. That in connection with a construction site at 184 Kent Avenue, Brooklyn, New York, JMH, a real estate developer, has engaged Northeast Interiors as the demolition subcontractor.

2. That Marathon Asset Management, LLC has been engaged in the business of investing and asset management.

3. That at all times material herein Local 79 has had a labor dispute with Northeast Interiors and has not had any primary dispute with either JMH or Marathon.

4. That on or about February 19 and March 18, 2008, the Union threatened representatives of JMH that it would picket and "shut down" JMH.

5. That on or about March 6, 2006, the Union blocked Bruce Richards, president of Marathon and members of his family, from entering into Cipriani's Restaurant.

6. That in or about the week of March 17, 2008, the Union by unidentified representatives, threatened to harm the Richards' family.

7. That on or about March 4, 2008, the Union induced employees of Marathon to cease work.

Based on these alleged facts, the General Counsel contends that the Union violated Section 8(b)(4)(i) and (ii) of the Act. Also, in her brief, the General Counsel contends that by the conduct alleged to have occurred on March 6, in front of Cipriani's Restaurant, the Respondent violated Section 8(b)(1)(A) of the Act. In the latter regard, I note that no charge was filed under that section of the Act and the Consolidated Complaint does not allege such a violation.

On the entire record, [1]including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

I. Jurisdiction

JMH Development, LLC is a real estate development company doing business in New York, Florida and Nevada. On an annual basis it derives gross income in excess of $500,000 and had derives revenue from firms located outside the State of New York in excess of $50,000. JMH therefore meets the Board's direct outflow standards for jurisdiction.

Marathon Asset Management LLC is a financial enterprise, with its main office and place of business in New York City. It operates a number of investment funds and does business throughout the United States and in foreign countries. Most of its customers are other institutions such as pension funds. Annually, it has gross revenue from fees and loans in excess of $1,000,000 and derives revenues in excess of $50,000 for services performed outside the State of New York. It therefore meets the Board's direct outflow standards for asserting jurisdiction.

Northeast Interiors is a New York corporation that has been engaged in providing demolition services for the Kent Avenue project. During the past year, it derived revenue in excess of $50,000 from JMH, which as noted above is engaged in interstate commerce pursuant to the Board's direct outflow standards. As such, Northeast Interiors is also engaged in interstate commerce based on the Board's indirect outflow standard for asserting jurisdiction.

Based on the above, it is concluded that JMH, Marathon and Northeast are persons and employers engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) and Section 8(b)(4)(B) of the Act.

It is conceded and I find that Local 79, Laborers International Union of North America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

---

[1] I am going to grant the respective Motions to correct the record except to the extent described below. The Union moved to correct the transcript at page 109, lines 15-17 and there was an objection to this. I requested the Reporting Service to double check the transcript and was notified, along with everyone else, that the transcript as written was correct. Accordingly, the Union's motion to correct the transcript is denied in this regard. The respective motions to correct the transcript and the follow up correspondence including my correspondence to and from the Reporting Service should be considered as part of this record.

II. The Alleged Unfair Labor Practices

The building involved in this case is located at 184 Kent Avenue, which is in the Williamsburg Section of Brooklyn and is rapidly becoming one of the new hip neighborhoods in New York City. It is a very large structure and was originally designed in the early 20th Century. For at least 70 years it was used as a warehouse. The building, which abuts the East River, (and having a fabulous view of the New York skyline), was purchased by JMH for conversion into apartments and retail stores. One of Marathon's real estate funds invested money in this project.

Initially, JMH hired a general contractor who in turn hired Breeze to do the demolition work. The employees of Breeze were represented by the Union and there was a collective bargaining relationship with that company and the Respondent. There were two phases of demolition; the first to clean out the existing structure and the second to carve out a rectangular space in the center of the building for the creation of a plaza type of space.

In December 2007, JMH became dissatisfied with the work done by Breeze and decided to terminate its contract with both the general contractor and with Breeze. Subsequently, JMH set up a subsidiary company to manage the construction and Northeast was engaged to finish the demolition work. Northeast is a non-union company.

In or about late January or early February, 2008, Northeast brought its own employees onto the job site. At or about the same time, representatives of Local 79 became aware that Breeze's contract had been terminated and that a non-union demolition contractor had been engaged to do the work.

There is no dispute and the evidence clearly establishes that the Union sought to have JMH cease doing business with Northeast and to put pressure on Marathon so that JMH would terminate its contract with Northeast and either rehire Breeze or retain a contractor having a collective bargaining agreement with Local 79. Accordingly, it is my opinion that the Union had a primary dispute with Northeast on account of its non-union standing and that Marathon and JMH were secondary employers within the meaning of Section 8(b)(4)(B) of the Act.

a. Alleged Conduct *vis a vis* JMH

The evidence shows that on or about February 19, a union representative, (either John Modika, a business agent, or Jerry Kraft an organizer, had a conversation with representatives of JMH and stated that unless the demolition work was done by a union contractor, the Union would picket the job site. [2] General Counsel's witnesses also testified that the union representative said that he would "close you down" and this was not denied by Kraft who specifically admitted that he said that the Union would "picket."

The evidence also shows that on at least one other occasion in March 2008, Kraft admittedly told representatives of JMH that the Union would engage in picketing unless it used a union contractor. Additionally, it was asserted that he again stated that he would "shut you down," an assertion that was not denied by Kraft.

[2] Kraft's title is "Market Development Representative." He is what used to be called an organizer. It is probable that he, and not Modika was the person who spoke to JMH representatives on or about February 19, 2008.

The General Counsel alleges that these statements to JMN constituted "threats, restrain or coercion" within the meaning of Section 8(b)(4)(ii) and as they were designed to force or require JMH, (a secondary person/employer) to cease doing business with Northeast, (the primary employer), the Union violated the Act. [3]

The Respondent argues that the statement to JMH that it would engage in picketing cannot be construed as a "threat" because the Union would legally be entitled to picket at a common situs under the rationale of *Sailors' Union of the Pacific (Moore Dry Dock*), 92 NLRB 547 (1950). In that case the Board established the following criteria for determining if picketing at primary situs is primary or secondary:

(a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises;
(b) At the time of the picketing the primary employer is engaged in its normal business at the situs;
(c) The picketing is limited to places reasonably close to the location of the situs; and
(d) The picketing discloses clearly that the dispute is with the primary employer.

The Board's position on this is that an unqualified threat to picket a primary employer at a secondary's common situs is a violation of the Act because the Union has given no assurance that it would comply with the restrictions set forth in *Moore Dry Dock*.

The Respondent cites *NLRB v. Ironworkers Local 433*, 850 F.3d 551 (9th Cir. 1988); *United Ass'n of Journeymen, Local 32 v. NLRB*, 912 1108, 1110 (9th Cir. 1990) and *Sheet Metal Workers' Int'l Ass'n., Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) for the proposition that at least two reviewing Circuit Courts have rejected the Board's view on this point.

As I am bound to follow the Board in its interpretation of the law, I conclude that in this respect the Respondent violated Section 8(b)(4)(ii)(B) of the Act.

The Respondent also contends that the alleged threat made to JMH to "shut you down," cannot be construed as a threat under subsection (ii) of 8(b)(4). It asserts that this is no more than a statement expressing the "hope" of what would be the consequence of any legal picketing activity that occurred and is therefore not a description of any particular kind of action itself. There is no evidence to suggest that either JMH or any other contractor at the common site employed people who were represented by the Respondent and who therefore would likely have refused to work or honor a lawful picket line if one had been put up by Local 79. There is, I must say, something to be said for the Union's argument.

Nevertheless, the Board has on several occasions, concluded that a statement made to a secondary employer that a union would "shut it down" is to be construed as a threat for purposes of the secondary boycott provisions of the Act. See *Operating Engineers Local Union*

[3] In its Brief, JMH contends that union representatives, on a couple of occasions, parked outside the construction site and handed out leaflets. It contends that the Union thereby engaged in picketing which induced or encouraged individuals to cease working for JMH or other persons in violation of Section 8(b)(4)(i)(B) of the Act. This is rejected. Firstly, I note that the Complaint does not make such an allegation and a Charging Party does not have any authority to amend the Complaint. . *GPS Terminal Services*, 333 NLRB 968, 969-970 (2002), and *Kaumagraph Corp*., 313 NLRB 624 (1993). Secondly, the theory that this conduct constituted "signal" picketing is not, in my opinion, supported by the evidence.

No. 3 (Westar marine Services), 340 NLRB 10, n 1, (2003) and *Local 456 International Brotherhood of Teamsters, (Peckham materials Corp*.) 307 NLRB 612 n. 2 and page 619, (1992).

Accordingly, I shall conclude that that in this respect the Respondent violated Section 8(b)(4)(ii)(B) of the Act.

b. Alleged Conduct *vis a vis* Marathon

In connection with this construction project, the Union decided to engage in a campaign to "shame" Bruce Richards, the CEO of Marathon, in an effort to persuade him to put pressure on JMH to use a union contractor. Basically, this campaign consisted of passing out leaflets to the public at his Manhattan office, at his residence on Central Park West, at a meeting he attended in California with potential investors, and at a charity event honoring him and his wife that took place on March 6 at Cipriani's restaurant on 42nd street.

The Union, commencing in early March 2008, has engaged in leafleting at both Bruce Richard's office and at his residence. Initially, it also used an inflatable rat that was placed outside his building but that was removed apparently because the building owners, who utilized union employees, complained to the appropriate official in Local 79. In any event, Jerry Kraft, sometimes assisted by others, has handed out leaflets at these locations for some time, usually in the morning outside his residence and in the afternoon outside his office. The original leaflet stated *inter alia*:

SHAME
ON BRUCE RICHARDS
CEO of MARATHON MANAGEMENT for allowing
Workers to be exploited at 184 Kent Avenue.

Allowing contractors to pay workers in a fashion which permits them to bypass the City, State and Federal tax structure is not only against the law, it costs taxpayers millions of dollars in lost tax revenue.
Untrained and unskilled workers will always lead to an unsafe workplace, shoddy workmanship and a lower quality finished product.
While New York City construction workers rebuild our city, help show your support for their desire to work in a safe environment receive a living wage, and be treated with the dignity and respect that they deserve.
Does BRUCE RICHARDS think it's worthwhile to exploit workers just so he can save a little money?
Call BRUCE RICHARDS at 212 -381-4400 and tell him that all workers deserve a living wage.
This leaflet is directed at the public and is not an inducement for anyone to stop working or make deliveries. [4]

The General Counsel points to an incident that occurred on March 6, 2008 in front of Cipriani's restaurant located on East 42nd street. This was a charity event where Bruce Richards and his wife, Avis, were being honored for charitable work that they had done. Avis Richards testified that she, along with her mother and son, arrived at the restaurant at about 6:00 p.m.

[4] This font is chosen here because it is similar to the font used in the leaflet.

where she saw that an inflatable rat had been posted on the street curb adjacent to the restaurant's entrance. (The sidewalk is particularly wide for a New York City street and the staircase leading up to the entrance is at least 20 feet wide at the street level). Mrs. Richards testified that as she and her family exited the vehicle, a group of union representatives approached, stood in front of them and "blocked" their way into the restaurant. In this regard, she testified that the union people attempted to hand flyers to her and that she refused to accept them. Mrs. Richards also testified that the union's people shouted obscenities directed at her husband until some security people escorted her and her family into the restaurant. By my reckoning, this entire incident took no more than a minute or two.

The General Counsel's theory is that the action described by Avis Richards constitutes a "threat, restraint or coercion" *vis a vis* Marathon. As noted above, the General Counsel in her brief also contends that the transaction on March 6 constitutes a violation of Section 8(b)(1)(A), notwithstanding the fact that no such allegation was ever made in the unfair labor practice charges or in the Consolidated Complaint. Nor was the alleged conduct directed toward any employee.

Based on the testimony of those who participated in this event, including Brian Grodin, it is my opinion, that union agents merely approached Avis Richards and attempted to hand her one of the leaflets that have been described above. At most, the evidence establishes a degree of rudeness on the part of union agents. On the other hand, the evidence does not, in my opinion, show that union agents attempted to physically block the Richards family from moving from the vehicle to the entrance of the restaurant. I therefore do not conclude that any union agents attempted to block her way or that they otherwise physically attempted to impede her or her family from going to the charity event.

There was also testimony by Melissa Davis who is employed by Marathon regarding an incident that occurred during the week of March 17. She testified that as she left the building, she observed union representatives Jerry Kraft and Anthony Reid distributing flyers to the public. This was not the first time that she had observed them doing this and the flyers in question, which also were distributed outside of Richards' apartment, said "Shame on Bruce Richards." (I assume these are the same flyers as the one described above). In any event, Davis testified that she engaged in conversation with one of the union agents who said: "Tell him that we're not going anywhere any time soon. We were at his home earlier this morning at 15 Central Park West. We know his wife, we know his children, and we know where his children go to school. We're going to be coming to his children's school. We're going to California in a few weeks. We're going to be here. We don't like having to do this, but Bruce left us with no choice."

The General Counsel asserts that these statements constitute a threat of physical harm to the Richards family. In the context of this case, I do not agree.

From early March 2008, the Union has engaged in a campaign of public leafleting and this campaign has been designed to cause "shame" to Bruce Richards. In this regard, the Union has handed out leaflets outside his office, outside his home and at a charity event. Apart from this one conversation, there has never been even a hint that personal physical action was ever contemplated. Clearly, the "shame" campaign was an attempt to embarrass Richards in any way and in any forum available to the Union. Therefore in the context of the preceding events, I construe these remarks as meaning only that as the Union had engaged in leafleting at various locations in the past, it might engage in leafleting at his children's school. And whatever one might say about the appropriateness of such a course of action, I cannot conclude that the Union threatened the Richards family with physical violence.

The General Counsel alleges that the Union violated Section 8(b)(4)(i)(B) by inducing or encouraging an individual, (Greg Florio), employed by Marathon to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services. In this regard, the General Counsel presented the testimony of Greg Florio, who is employed as the *de facto* General Counsel for Marathon.

Florio testified that on or about March 4, he had a conversation with a union representative outside the office building and that this person said to him: "[T]his asshole, Bruce Richards can afford a fancy apartment, but he doesn't want to pay workers in Brooklyn." Florio states that when he told this person that Richards was the wrong guy and had nothing to do with those decisions, the agent responded: "Oh, you know this asshole? How can you work for such an asshole? You should be ashamed of yourself." Florio states that this person went on to say that he should tell Richards to "do the right thing" and that the Union was not going to go away until he did.

In my opinion, there is nothing in this conversation that could reasonably be construed as an attempt to actually induce or encourage Florio, Marathon's counsel, to engage in a work stoppage or a refusal to work for Marathon. A statement indicating opprobrium about working for "such an asshole" cannot, in my opinion be taken by any reasonable person, as a real request that Florio stop working for his employer. In effect the "question" asked by the union representative is in the nature of a rhetorical question and should not be understood as a real request that Florio cease working for Marathon.

CONCLUSIONS OF LAW

By threatening, coercing or restraining JMH Development, LLC, with an object of forcing it to cease doing business with Northeast Interiors, the Respondent, Local 79, Laborers International Union of North America, AFL-CIO, has violated Section 8(b)(4)(ii)(B) of the Act.

The acts by of the Respondent have affected commerce within the meaning of Section 2(2), (6) and (7) of the Act and Section 8(b)(4)(ii)(B) of the Act.

The Respondent has not violated the Act in any other manner alleged in the Consolidated Compliant.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it take certain affirmative action necessary to effectuate the purposes of the act.

ORDER

The Respondent, Local 79, Laborers International Union of North America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from,

(a) Threatening, coercing, or restraining JMH Development LLC, where an object thereof is to force or require JMH Development LLC to cease doing business with Northeast Interiors or any other person.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its office, copies of the attached notice marked "Appendix." [5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Also, if the Union publishes a newsletter for its members, this notice should be published therein. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail a copy of the notice to JMH Development LLC and to Northeast Interiors.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 16, 2008.

Raymond P. Green
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten, coerce, or restrain JMH Development LLC, where an object thereof is to force or require JMH Development LLC to cease doing business with Northeast Interiors or any other person.

LOCAL 79, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
(Union)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center (North), Jay Street and Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.